

ST 05-10

Tax Type: Sales Tax

Issue: Exemption From Tax (Charitable or Other Exempt Type)

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

ABC PARK COMMUNITY LIFE)	Docket No.	04-ST-0000
DEVELOPMENT, INC.,)	IBT No.	0000-0000
Taxpayer)		
v.)		
THE DEPARTMENT OF REVENUE)	John E. White,	
OF THE STATE OF ILLINOIS)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: *John Doe* appeared for *ABC PARK* Community Life Development Center; Shepard Smith, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis:

This matter arose when *ABC PARK* Community Life Development Center (“*ABC*” or “taxpayer”) protested the Illinois Department of Revenue’s (“Department”) denial of its application for an exemption identification number pursuant to § 1g of the Retailers’ Occupation Tax Act (“ROTA”). 35 ILCS 120/1g. The issue is whether taxpayer is entitled to an exemption from Illinois use tax, pursuant to § 3-5(4) of Illinois’s Use Tax Act (“UTA”), because it is organized and operated exclusively for charitable purposes. 35 ILCS 105/3-5(4).

The hearing was held at the Department’s offices in Chicago. *ABC* presented documentary evidence consisting of books and records, as well as the testimony of a

member of ABC's board of directors. I have reviewed that evidence, and I am including in this recommendation findings of fact and conclusions of law. I recommend the issues be resolved in favor of the Department.

Findings of Fact:

1. ABC is an Illinois not-for profit corporation. Applicant Ex. 2 (copies of ABC's original and amended articles of incorporation), pp. 1-3.
2. ABC's amended Articles of Incorporation set out the following corporate purposes:

The purpose for which this corporation is established is to provide for the creation, development and operation of a community center and associated Housing for the elderly for the Village of ABC and the surrounding rural area, to accept and disburse contributions, gifts, and bequests from individuals, groups, or businesses to provide facilities and programs to meet and enrich the spiritual, physical educational and emotional well being of people of all ages. The organization is organized exclusively for charitable, religious, educational and/or scientific purposes under section 501(c)(3) of the Internal Revenue Code.

Applicant Ex. 2, p. 3; Applicant Ex. 3 (copy of ABC's by-laws), p. 1.

3. In 2003, ABC received § 501(c)(3) status from the Internal Revenue Service ("IRS"). Applicant Ex. 1 (copy of March 7, 2003 IRS letter acknowledging ABC's § 501(c)(3) status).
4. During the period at issue, ABC was developing *Retirement Home* ("*Retirement*"), which is a senior, independent living retirement village in Anywhere County, Illinois. Applicant Exs. 4 (copy of site plan illustration showing *Retirement*), 5 (copy of photos showing some of the completed residential buildings at *Retirement*), 6 (copy of ABC's response to the Department's document request of

April 14, 2004).

5. Residential units at *Retirement Home* are offered on a subscription lease basis. Department Ex. 2 (copies of various books and records and documents made by *ABC*, and tendered to the Department, to support taxpayer's exemption application), pp. 18-19, 27-28.
6. A subscription lease is a plan that enables a potential subscriber to lease a unit until he dies or until he moves from the unit. Applicant Ex. 6, p. 6. *ABC* offers two subscription lease plans, depending on whether the lessee is low income qualified or not. *Id.*, pp. 5 (Housing Unit Lease Plans), 7 (Housing Unit Lease Plans for Low Income Qualified Residents Only).
7. Each of the subscription leasing plans share the same three types of fees: a subscriber lease fee; an entrance fee; and a monthly maintenance fee. *Id.*
8. The subscriber lease fee, which *ABC* refers to as "the endowment principal" in its written Subscription Agreements, is the cost of leasing a unit until a prospective resident moves out of the unit or dies. Applicant Exs. 6, 9 (copy of executed Subscriber Agreement – Low Income Qualified Only), 10 (copy of blank Subscriber Agreement), p. 1 (of each exhibit).
9. *ABC's* written Subscription Agreements provides for conditional refunds of a subscriber's lease fee differently, depending on the type of Subscriber Agreement. *Compare* Applicant Ex. 9, p. 3 *with* Applicant Ex. 10, p. 3.
10. The refund provision in *ABC's* regular Subscription Agreements provide that if a resident moves out of the development or dies, 90% of his Subscriber Lease Fee is to be refunded to him or to his estate, upon satisfaction of certain conditions, 60

days after a new tenant leases the unit. Applicant Ex. 10, p. 3.

11. The refund provision in ABC's Low Income Qualified Only Subscriber

Agreements provides:

5. A percentage of the endowment principal shall be conditionally refunded for the first 5 years.

A. \$8,000 per year will be deducted from the endowment principal for the first 5 years.

and (as (hereinafter provided) to the Subscriber (or to the Subscriber's estate, if applicable), after:

A. The Subscriber applies in writing for a refund of said sum and gives written notice to [ABC] of his or her desire to terminate this agreement.

B. The death of a Subscriber. The Subscriber's obligations under this Agreement shall terminate at death.

The payment of any such endowment principal refund to the subscriber will not take place until 60 days after a new subscriber has taken occupancy of the said independent living unit.

There shall be deducted from the refund of any endowment principal any unpaid service fees.

Applicant Ex. 9, p. 3.

12. ABC has explained its low income refund policy, and the provision quoted above,

as follows:

*** After the unit has been leased to a new resident a refund of the Subscriber Lease Fee is given to the previous resident or their estate. The amount you would get refunded is based on the length of time you live there. The **refund is based** on a reducing basis at \$8,000 per year over the first 5 years. ***

Low Income Qualified Plan

Lease fee for 600 Sq. Ft. unit without garage - \$40,000
Refund Pro-Rated over 5 years. After 1st year minus 25%,
2nd year minus 25%, 3rd year minus 25%, after 4th year
minus final 25%

Entrance Fee - \$5,000

Monthly Maintenance Fee - \$500 with Special Services
Plan, 2 nd person \$250

Reduced Plan - \$350 with Reduced Services Plan, 2 nd
person \$250

Applicant Ex. 6, pp. 8-9 (emphasis original).

13. A resident may sublease a unit if he agrees to a sublease modification. Applicant Ex. 6, p. 6.
14. The entrance fee is a non-refundable, tax-deductible donation charged to each new lessee to support the ongoing operations of *Retirement's* community center. Applicant Ex. 6, p. 6.
15. The monthly maintenance fee represents charges *ABC* designates as being associated with: community center and grounds usage; monthly meal pass (30 meals); cable TV; lawn and grounds care; snow removal; utilities; special activities fees; maintenance fund; house cleaning (every two weeks). Applicant Ex. 6, p. 17 (monthly fee breakdown). For qualified low income subscribers, cable TV is available as an option, at *ABC's* cost. Applicant Ex. 9, pp. 4-5.
16. Monthly management fees, which *ABC's* Subscriber Agreements refer to as "service fees," are to be paid by a subscriber on the first day of the month. Applicant Exs. 9-10 (p. 4 of each exhibit).
17. *ABC's* Subscriber Agreements impose a 5% late fee for monthly service fees not received prior to the 10th of the month. Applicant Exs. 9-10 (p. 4 of each exhibit).
18. *ABC's* Subscriber Agreements allow *ABC* to increase, following 30 days advance written notice, monthly management fees up to 20% per year, to reflect increases in costs of services. Applicant Exs. 9-10 (p. 4 of each exhibit).
19. *ABC* includes the following clause within its Low Income Qualified Only Subscriber Agreements: "**Charitable Care Policy** – Low Income qualified

- residents using either of the above plans [i.e., a Special Service Plan, or a Reduced Service Plan] who become unable to pay these monthly fees will be able to live at *Retirement Home* for no charge. These residents will continue to receive the same service plan they are on. Proof of inability to pay is required.” Applicant Ex. 9, p. 5.
20. The Charitable Care provision included within ABC’s Low Income Qualified Subscriber Agreements is not included within its regular Subscriber Agreements. Applicant Ex. 10, p. 5.
21. ABC’s regular Subscriber Agreements include the following provision: “If the occupant is no longer able to pay monthly service fees or fails to abide by the terms of the this Agreement, [ABC] reserves the right to terminate said occupancy upon thirty (30) days written notice. In the event of termination, any unpaid service fees shall be deducted from any endowment sum refundable to the Subscriber under this Agreement.” Applicant Ex. 10, p. 6.
22. Both ABC’s regular and its low income Subscription Agreements provide that: “There shall be deducted from the refund of any endowment principal any unpaid service fees.” Applicant Exs. 9-10 (p. 3 of each exhibit).
23. *Retirement* units come in three sizes, a 600 sq. ft. model, an 800 sq. ft. model and a 1,000 sq. ft. model. Applicant Ex. 6, pp. 5, 7.
24. The different costs for ABC’s regular and low income lease plan vary depending on the size of the unit. Department Ex. 2, pp. 18, 27.

25. The costs for *ABC*'s regular lease plan are as follows:

Regular Subscription Agreement			
Unit Size	600 ft.²	800 ft.²	1,000 ft.²
Subscriber Lease Fee	\$55,000	\$79,250	\$96,250
Entrance Fee	\$15,000	\$20,000	\$22,000
Monthly Maintenance Fee	\$635		
Monthly Maintenance Fee (2d resident in unit)	\$250		

Department Ex. 2, p. 27.

26. The costs for *ABC*'s low income lease plan are as follows:

Low Income Qualified Subscription Agreement			
Unit Size	600 ft.²	800 ft.²	1,000 ft.²
Subscriber Lease Fee	\$40,000	\$67,150	\$84,150
Entrance Fee	\$5,000	\$5,000	\$7,000
Monthly Maintenance Fee	\$500 (with meals) or \$350 (without meals)		
Monthly Maintenance Fee (2d resident in unit)	\$250		

Department Ex. 2, p. 18.

27. Until *Retirement*'s Community Center was completed, *ABC* capped its monthly management fees at \$300 per month. Applicant Exs. 9-10 (p. 5 of each exhibit).
28. *ABC* had a certified public accountant prepare reports showing *ABC*'s Projected Balance Sheet, its Projected Statement of Income and Expenses, and its Projected Statement of Cash Flow, for years 2002 through 2007. Department Ex. 2, pp. 9-13. The CPA did not audit the financial statements *ABC* gave it to use for those reports. Department Ex. 2, p. 9.
29. *ABC*'s Projected Statement of Income and Expense reflects, *inter alia*, as follows:

INCOME / EXPENSE CATEGORY¹	2002	2003	2004	2005	2006	2007
Total Income	0	568,280	1,181,680	1,558,130	1,753,110	1,243,370
Total Cost of Sales	0	406,400	801,200	974,000	1,138,900	675,600
Gross Profit on Sales	0	161,880	380,480	584,130	614,210	567,770
Total Operating Expenses	60,000	162,900	195,200	269,700	294,600	294,600
Net Income from Operations	(60,000)	(1,020)	185,280	314,430	319,610	273,170

Department Ex. 2, p. 11.

30. *ABC*'s Projected Statement of Income and Expense also reflects, *inter alia*, as an item of "OTHER INCOME (EXPENSE)," that it either received, or anticipates receiving, the following amounts as donations and/or grants during years ending in 2002 through 2007:

OTHER INCOME / (EXPENSE) CATEGORY	2002	2003	2004	2005	2006	2007
Income from Donations/Grants	125,000	600,000	35,000	35,000	35,000	35,000

Department Ex. 2, p. 12.

31. At the time of the hearing, *ABC* had entered into two signed leases, one of which was at the low income resident rate. Tr. pp. 16-20 (testimony of *John Doe*)

¹ "Total Income" includes the following items of income: Entrance Fee[s]; Sale of Homes; Sales of Cottages; Sale of Duplexes; Community Center Memberships; Tax Credit Sales; Low Income Refund Recovery/Discount; Low Income Discounts. Department Ex. 2, p. 11. "Total Cost of Sales" represents *ABC*'s construction costs for homes. *Id.* "Gross Profit on Sales" represents the difference between *ABC*'s Total Income and its Total Cost of Sales. *Id.* "Total Operating Expenses" include the expenses associated with the following account items: Salaries & Wages; Payroll Taxes & Benefits; Building Maintenance & Supplies; Utilities; Insurance; Pool Maintenance; Telephone; Postage; Office Supplies; Advertising; Marketing & Promotion. Depreciation. *Id.* Finally, "Net Income from Operations" represents the difference between *ABC*'s Gross Profit on Sales and its Total Operating Expenses. *Id.*

(“Doe”), a member of ABC’s board of directors); Applicant Ex. 9.

Conclusions of Law:

Section 3-5 of the UTA provides, in pertinent part:

Exemptions. Use of the following tangible personal property is exempt from the tax imposed by this Act:

(4) Personal property purchased by a governmental body, by a corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious, or educational purposes, or by a not-for-profit corporation, society, association, foundation, institution, or organization that has no compensated officers or employees and that is organized and operated primarily for the recreation of persons 55 years of age or older. ... On and after July 1, 1987, however, no entity otherwise eligible for this exemption shall make tax-free purchases unless it has an active exemption identification number issued by the Department.

35 ILCS 105/3-5.

This matter involves the propriety of the Department’s denial of ABC’s application for an active exemption identification number described in UTA § 3-5(4), so that it might purchases tangible personal property at retail, without paying use tax. Section 7 of the ROTA, which is incorporated by § 12 of the UTA, provides, in pertinent part:

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be on upon the person who would be required to remit the tax to the Department if such transaction is taxable. ***

35 ILCS 120/7.

Section 7 also places the burden on a taxpayer who wants to show that it is entitled to certain deductions authorized by statute. 35 ILCS 120/7. Thus, in this case, the Department established its prima facie case when it introduced Department Group Exhibit 1 under the certificate of the Director. Department Ex. 1; Tr. p. 10. That exhibit, without more, constitutes prima facie proof that ABC is not entitled to the sought-after exemption. 35 ILCS 120/7-8. The Department's prima facie case is overcome, and the burden shifts to the Department to prove its case, only after a taxpayer presents evidence that is consistent, probable and closely identified with its books and records, to show that the Department's determinations were not correct. Copilevitz v. Department of Revenue, 41 Ill. 2d 154, 157-58, 242 N.E.2d 205, 207 (1968). Additionally, "... when a taxpayer claims that he is exempt from a particular tax, ... the burden of proof is on the taxpayer." Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981) (citing Telco Leasing, Inc. v. Allphin, 63 Ill. 2d 305, 347 N.E.2d 729 (1976); Bodine Electric Co. v. Allphin, 81 Ill. 2d 502, 410 N.E.2d 828 (1980)).

When considering whether an entity is a corporation organized and operated exclusively for charitable purposes, Illinois courts and the Department follow the guidelines announced by the Illinois Supreme Court in Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149, 233 N.E.2d 537 (1968). While the Methodist Old Peoples Home case involved a property tax dispute, the guidelines are similarly applicable to a charitable exemption under Illinois' retailers' occupation and use tax acts. Wyndemere Retirement Community v. Department of Revenue, 274 Ill. App. 3d 455, 459-60, 654 N.E.2d 608, 611-12 (2d Dist. 1995). As applied to this matter, those guidelines ask whether:

- (1) the benefits derived are for an indefinite number of persons for their general welfare or in some way reducing the burdens on government;
- (2) the organization has no capital, capital stock, or shareholders, and does not profit from the enterprise;
- (3) funds are derived mainly from private and public charity, and the funds are held in trust for the objects and purposes expressed in the organization's charter;
- (4) charity is dispensed to all who need and apply for it; and
- (5) obstacles are placed in the way of those seeking the benefits;

Eden Retirement Center, Inc. v. Department of Revenue, 213 Ill. 2d 273, 287, 821 N.E.2d 240, 248 (2004)² (citing Methodist Old Peoples Home, 39 Ill.2d at 156-57, 233 N.E.2d 537).

The Department argues that taxpayer fails to meet all of the applicable criteria. Specifically, it argues that taxpayer derives most of its funding through lease and/or other fees obtained from persons who either reside or become members of the community center, rather than from public or private charity. Tr. pp. 58-66. The Department next argues that taxpayer has failed to show how its activities constitute charity in the first place. Tr. pp. 66-72, 75. It finally asserts that, to the extent that taxpayer's activities constitute charity, it does not dispense charity to all who seek it, and that it presents significant obstacles — namely, the fees taxpayer charges for housing and/or membership in the community center — to persons who seek charity from taxpayer. Tr. pp. 72-75.

The Department is correct that *ABC* obtains most of its revenues from fees from *Retirement's* subscribers and from other persons using *Retirement's* community center, as opposed to public or private charity. For the years 2002 through 2004, *ABC* received \$1,749,960 in income from entrance fees, selling homes, cottages and duplexes,

community center memberships, tax credit sales, low income refund recovery/discount, low income discounts (Department Ex. 2, p. 11 (income items included in “Total Income”)), and \$760,000 from donations or grants. Department Ex. 2, p. 12. If its projected statements of income and expenses are accurate, moreover, as time goes on, *ABC* will obtain an even greater percentage of its revenues from subscriber and other fees than from donations and/or grants. That is, for the years 2005 through 2007, *ABC* anticipates receiving total income of \$4,554,610, yet only \$105,000 in grants and/or donations during that same three-year period. Applicant Ex. 6, pp. 11-12. The evidence regarding this part of the Methodist Old Peoples Home test, therefore, tends to indicate that applicant is not an exclusively charitable organization.

The nature of *ABC*’s purpose and activities is the next factor at issue. *ABC*’s essential purposes are “to provide for the creation, development and operation of a community center and associated Housing for the elderly for the Village of *ABC* and the surrounding rural area, to accept and disburse contributions, gifts, and bequests from individuals, groups, or businesses to provide facilities and programs to meet and enrich the spiritual, physical educational and emotional well being of people of all ages. *** ” Applicant Ex. 2, p. 3. The Illinois Supreme Court has repeatedly held that “a charity is a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, persuading them to an educational or religious conviction, for their general welfare — or in some way reducing the burdens of government” People ex rel. Nodlund v. Assoc. of Winnebago Home for the Aged, 40 Ill. 2d 91, 100, 237 N.E.2d 533, 539 (1968) (*quoting* Methodist Old Peoples Home, 39 Ill.2d at 156-57, 233 N.E.2d at

² The sixth guideline, which asks whether the primary use of the property is for charitable purposes, is not applicable here because this matter does not involve *ABC*’s use of real property.

541-42). Creating, developing and operating a community center and associated housing clearly benefits the elderly for the Village of *ABC* and the surrounding area. Just as clearly, however, *ABC* does not make a gift of membership in *Retirement*'s community center, or of *Retirement*'s housing, to the elderly of Iroquois County, Illinois. Rather, everyone who becomes a *Retirement* community center member, and everyone who becomes a *Retirement* subscriber, pays for those benefits.

But this does not mean that I agree with the Department's suggestion that *ABC* performs no charitable activities whatever. The gift *ABC* gives to certain of its housing subscribers is, at best, its promise to conditionally forgive a current occupant's service fees.³ That is, the evidence shows that *ABC* has pledged to allow a low income subscriber to continue to occupy a unit, and to continue to enjoy the services previously paid for under the subscriber's chosen service plan, without making service fees — or, in *ABC*'s own words, “for no charge” — upon proof that the subscriber has become financially unable to pay such fees. Applicant Ex. 9, p. 3; *see also* Department Ex. 2, pp. 18-19. This charity, however, is not given to all who might ask for it; it is available only to low income subscribers, and only once such a subscriber has shown that he is financially unable to pay.

³ Since the refund provision of *ABC*'s low income Subscription Agreements provides that unpaid service fees will be deducted from a refund of a subscriber's endowment principal, there is a possibility that *ABC* may not be forgiving all, but instead may be forgiving some and forbearing from timely collecting some of a financially unable to pay low income subscriber's payments of monthly service fees. In the latter case, the amount of the *in futuro* charitable gift would be the difference between the total unpaid fees and the amount, if any, of the endowment principal available for refund. My uncertainty of whether *ABC* has contracted to conditionally forgive all, or only part, of a low income subscriber's unpaid service fees is based on the ambiguities in the text of the low income subscriber agreement's refund and charitable care policy provisions, and my uncertainty as to how *ABC* (or a court, should it come to that) would interpret those provisions, once a low income subscriber: (1) claims benefit of the charitable care policy provision, and thereafter; (2) claims a refund of an endowment principal.

In a nutshell, then, *ABC* has established that it has entered into one contract, and that it will presumably continue to enter into similar contracts with others, in which it has pledged to perform charity upon the occurrence of a specific condition, which condition has not yet occurred. Thus, the question may be phrased as whether, for tax purposes, an enforceable yet conditional promise to give a gift in the future is the same as giving a gift today? Or, to put it another way, under Illinois law, does a non-profit organization's pledge to perform charitable acts in the future render the organization exclusively charitable today? I cannot answer either question in the affirmative. One of the hallmarks of an exclusively charitable organization is that it provides — present tense — charity to all who ask for it (*see, e.g., Wyndemere Retirement Community*, 274 Ill. App. 3d at 460, 654 N.E.2d at 612 (*Korzen* factors should be analyzed by reviewing applicant's past acts and future policies)), and not merely that it pledges to provide such charity should some persons require it in the future.

On a related point, I now address whether *ABC*'s offers of discounted subscription and entrance fees to persons whose income meets *ABC*'s definition of low income constitutes charity. That is, does offering discounted fees to those less able to pay the upfront costs of housing at *Retirement*, in itself, constitute charity? First, the limited universe of persons to whom *ABC* offers low income discounts must still pay considerable subscription and entrance fees associated with becoming a subscriber. Thus, even with the discounts, *ABC* still places obstacles before those seeking its benefits. Second, asking whether offering discounts for benefits to those less able to pay for them skirts the critical question, which is whether *ABC* would provide housing to someone who was unable to pay any subscription or entrance fees at all. Wyndemere

Retirement Community, 274 Ill. App. 3d at 460, 654 N.E.2d at 612 (“Charging fees and rendering benefits to persons not poverty-stricken does not destroy the charitable nature of an organization, but this is only true to the extent that the organization also admits persons who need and seek the benefits offered but are unable to pay.”). *ABC* never indicated at hearing that it would admit someone who could not afford its subscription and/or entrance fees even once, let alone that it would do so whenever anyone in such a position asked for housing at *Retirement*.

Also important to the question of whether *ABC*’s low income discounts on subscription and entrance fees constitute charity is the effect of the different refund provisions in *ABC*’s regular versus its low income Subscription Agreements. Because of those different refund provisions, low income qualified subscribers at *Retirement* will, should they stay for five years, end up paying higher subscription fees than regular subscribers. Specifically, regular subscribers (or their estates) will receive a refund of 90% of their subscription fee once a new subscriber leases a unit vacated by the former subscriber. Thus, a regular subscriber of a 600 ft.² unit will receive a refund of \$49,500 of his \$55,000 subscription fee, a subscriber of an 800 ft.² unit will be refunded \$71,325 of his \$79,250 fee, and a subscriber of a 1,000 ft.² unit will be refunded \$86,625 of his \$96,250 fee. In each respective case, therefore, after the occupancy period has ended, a regular subscriber will have paid subscription fees of \$5,500, \$7,925, or \$9,625.

On the other hand, each low income subscriber transfers to *ABC* \$8,000 of his subscription fee for each of the first five years he occupies a unit at *Retirement*. Thus, after five years of occupancy, a low income subscriber of a 600 ft.² unit will receive no refund of the \$40,000 fee he paid, a subscriber of an 800 ft.² unit will be refunded

\$27,150 of his \$67,150 fee, and a subscriber of a 1,000 ft.² unit will be refunded \$44,150 of his \$84,150 fee. Even if one includes the non-refundable entrance fees as part of the calculation of the relative costs of entry into *Retirement* for regular versus low income subscribers, after five years, each low income subscriber will have actually paid, at minimum, \$45,000 (i.e., the \$40,000 of his subscription fee that is not subject to refund, plus \$5,000 non-refundable entrance fee), whereas the most any regular subscriber would end up paying would be \$31,250 (i.e., \$9,625, which is the non-refundable 10% of the entrance fee for a 1,000 ft.² unit, plus the non-refundable \$22,000 entrance fee).⁴ In other words, low income subscribers pay less upfront to get entry into *Retirement* than do regular subscribers, but they pay for that discount by transferring outright to *ABC* a much higher percentage of the subscription fees they do pay, than do regular subscribers. Thus, the discounts are more in the nature of *ABC*'s restructuring of its subscription fees than a charitable gift from *ABC* to qualifying low income subscribers. Based on the facts of record, I conclude that *ABC*'s actions in extending discounts to low income qualified subscribers do not constitute charity.

More generally, *ABC*'s operations are similar in pertinent respects to the operations of the applicants in the cases discussed by the Illinois Supreme Court in Small v. Pangle, 60 Ill. 2d 510, 328 N.E.2d 285 (1975), and later, by the Illinois Appellate Court, in Good Samaritan Home of Quincy v. Illinois Department of Revenue, 130 Ill. App. 3d 1036, 474 N.E.2d 1387 (4th Dist. 1985). In Small, the Court discussed the

⁴ In this way, a regular subscriber's Subscriber Lease Fee is equal to an immediate transfer of 10% of the endowment principal to *ABC*, plus a transfer to *ABC* of the use of the entire endowment principal during the term of the subscriber's occupancy. In contrast, a low income subscriber's Subscriber Lease Fee is equal to an immediate transfer of \$8,000 for each of the subscriber's first five years of occupancy, plus a transfer to *ABC* of the use of the remainder of the endowment principal during the term of the subscriber's occupancy.

similarities between the applicant there, Heritage House, which operated an old folks home, and the applicants/old folks homes in Willows v. Munson, 43 Ill. 2d 203, 251 N.E.2d 249 (1969), People ex rel. Nordlund v. Winnebago Home for the Aged, 40 Ill. 2d 91, 237 N.E.2d 533 (1968), and Methodist Old Peoples Home v. Korzen, 39 Ill. 2d 149, 233 N.E.2d 537 (1968). The Small Court's comparison and holding is as follows:

The rationale of the foregoing cases is applicable to this case. Substantial monthly charges were paid by all of the residents of the home. Unlike the cited cases, an entrance fee was not required. We do not consider this distinction to be significant, particularly in view of the substantial monthly charges imposed and the requirement of a three-month payment at the inception of one's stay at the home. The operating income totaled \$465,000, was derived almost entirely from the monthly rental charges, and was approximately \$33,000 in excess of the operating expenses, exclusive of depreciation. It appears to us that the greatest source of funds is not from either private or public charity. The variance of the monthly charges, based upon size or location of a room, smacks of the practices found in the cited cases as being indicative of a noncharitable use. The fact that during its period of operation, the Heritage House has admitted no one who was apparently unable to pay the monthly charges; and the further fact that it has never had a resident who was unable to pay these substantial monthly charges, indicates that the property is not used for charitable purposes — the benefit of an indefinite number of people, and that financial obstacles are placed in the way of aged persons who may be needing the benefits that the home provides. We conclude that the property in question is not in fact exclusively used for charitable purposes.

Small, 60 Ill. 2d at 517-18, 328 N.E.2d at 289.

In Good Samaritan Home of Quincy, a non-profit organization (the Home) that operated a nursing home expanded its operations to include 90 residential cottages for couples or individuals, and sought a charitable exemption for the property on which those cottages were situated. Good Samaritan, 130 Ill. App. 3d at 1037, 474 N.E.2d at 1389.

To finance the construction of the cottages, the Home charged a prospective resident the full construction cost of a cottage on a prepaid rent basis, and then deducted an assigned monthly rent from that prepaid rent, until the prepaid amount was depleted. Thereafter, the resident would pay rent for the cottage. If the resident died or moved out before the prepaid rent was depleted, any unused amount would be refunded to the resident or to his estate, and the next resident was required to deposit the remaining unpaid cost of construction. After the Home recovered its cost of construction for a cottage, the unit was rented on a monthly basis with no prepayment. *Id.* at 1037-38, 474 N.E.2d at 1389. In that case, the Home attempted to distinguish its operations from prior cases, such as the ones discussed in Small, since it allowed refunds of prepaid rent charges. *Id.* at 1040, 474 N.E.2d at 1391. The court, however, rejected that argument, holding that the prepayment requirement “clearly represents an obstacle to the receipt of the benefits offered by the Home.” *Id.* at 1041, 474 N.E.2d at 1391.

The Good Samaritan court further concluded that:

The record further indicates that a person who does not have the money to pay the construction cost, or whatever prepayment amount that remains, will not be considered for one of those apartments and will be limited to one of the cottages that does not have a prepayment requirement. The Home did not present any evidence that a person who had been unable to pay, or that was on public aid, had ever lived in the cottage apartments. Accordingly, we conclude that the Home does not dispense aid to those who need and apply for it.

The record indicates that the primary purpose of the cottage apartments is to provide living quarters for residents. The apartments are primarily used as residential lodging for those individuals fortunate enough to be able to afford the financing of their construction and for the monthly rental requirements. Although the apartments are pleasant and benefit those who reside in them, they are

merely a convenient way for elderly people to feel secure and live in an environment that satisfies their needs according to their ability to pay. If they do not pay, their residency may be terminated. There is no provision mandating that any charity be dispensed to individuals who do not pay or to any destitute member of society in general. The incidental benefit accruing to the public is no different from that associated with almost any lawful housing endeavor. Accordingly, we conclude that the primary use of the property in question is not for charitable purposes.

Good Samaritan, 130 Ill. App. 3d at 1041, 474 N.E.2d at 1391.

The Good Samaritan court's conclusions are equally applicable here. Every subscriber at *Retirement* pays a considerable price to get in, and those who qualify as low income subscribers may actually pay more in subscription fees than its regular subscribers. While *ABC* has contracted to allow qualified low income subscribers to continue to live in a unit without paying monthly service fees in the event they become financially able to pay such monthly fees, to date, that action constitutes nothing more than a promise to perform charity, for some, in the future. Should that contractual promise ever ripen into actual charitable action, moreover, it would not inure to the benefit of *Retirement's* regular subscribers, even if they too should become financially unable to pay.

In sum, I agree with the Department's arguments that under the applicable Methodist Old Peoples Homes criteria, *ABC* is not a corporation that is organized and operated exclusively for charitable purposes. *ABC* has derived and will continue to derive most of its income through fees from *Retirement's* subscribers and through other income-producing operations, rather than from public or private charity. Department Ex. 2, pp. 11-12. *ABC* does not dispense charity to all who seek it, but only to its low income subscribers, and then only conditionally. Applicant Ex. 9. *ABC* presents significant

obstacles to persons who seek charity from it, which are the fees it charges for housing, and the other charges it makes for other services at *Retirement*. Department Ex. 2, pp. 18, 27. Finally, the subscription and entrance fees *ABC* charges differ based on the size of the residence offered at *Retirement*. Small, 60 Ill. 2d at 517, 328 N.E.2d at 289 (“The variance of the monthly charges, based upon size or location of a room, smacks of the practices found in the cited cases as being indicative of a noncharitable use.”).

Conclusion:

I recommend that the Director finalize the Department’s tentative denial of *ABC*’s application for an exemption identification number.

Date: 5/10/2005

John E. White
Administrative Law Judge